MONROE COUNTY CLERK'S OFFICE

THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt # 3747220

Book Page CIVIL

No. Pages: 17

Instrument: MEMO OF LAW

Control #: 202402161633
Index #: E2024003035

Date: 02/16/2024

Time: 6:19:31 PM

Return To:
JENNIFER MORGAN LEVY
24 N. Main Street
Suite 2
Fairport, NY 14450

Dias, Liyanagamage Ranganath Prabashwara

University of Rochester

Total Fees Paid: $0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS ENDORSEMENT, REQUIRED BY SECTION 317-a(5) & SECTION 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK. DO NOT DETACH OR REMOVE.

JAMIE ROMEO

MONROE COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the matter of the Application of Liyanagamage Ranganath Prabashwara Dias, Petitioner, against University of Rochester, Respondent.	INDEX NO. MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S ORDER TO SHOW CAUSE **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S ORDER TO SHOW CAUSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

PRELIMINARY STATEMENT

Petitioner Liyanagamage Ranganath Prabashwara Dias ("Dr. Dias") is a tenure-track assistant professor at the University in the Departments of Mechanical Engineering and Physics and Astronomy at the University of Rochester (the "University"). Dr. Dias is challenging the University's decision to investigate charges against him by appointing a biased committee without the requisite competence. In doing so, the University ignored its own policies and procedures related to investigations of tenure-track faculty. The University sets forth its policies regarding matters such as these in their Faculty Handbook (the "Handbook"). The University failed to follow Handbook procedures in two ways: (1) because the investigation relates to Dr. Dias's academic freedom, a grievance committee must assess evidence and develop a factual record, and (2) because the investigation jeopardizes Dr. Dias's tenure track, the University Committee on Tenure and Privileges ("UCTP") must evaluate that factual record before any decision is made concerning Dr. Dias's employment.

Dr. Dias faces immediate and irreparable harm. The University accepted the biased findings of the University's Research Misconduct Investigation ("RMI") and promised Provost David Figlio and Dean Wendi Heinzelman will soon make his determination regarding corrective action aligned with those findings. Dean Heinzelman and Provost Figlio's making these determinations constitutes an egregious conflict of interest as Dr. Dias has a pending grievance and article 78 proceeding related to their actions. It is more than likely Dr. Dias's employment will be terminated without enjoying the Handbook's mandated due process. The University convened the RMI in disregard of its own policies, and therefore acted arbitrarily and capriciously. For these and the following reasons, Dr. Dias's Article 78 Petition for an order to show cause should be granted.

STATEMENT OF FACTS

Dr. Dias, an assistant professor at the University, specializing in the highly competitive field of low-temperature, high-pressure superconductivity, was notified in March of 2023, the National Science Foundation ("NSF") had received a complaint alleging he engaged in research misconduct. *See* Affidavit of Dr. Dias, Exhibit A, Letter from NSF to Vice President Dewhurst, CC'ing Dr. Dias. While the NSF's instruction and the University's Research Misconduct Policy ("the Policy") describes the University's process for responding to alleged misconduct as one that provides for "an objective examination of the facts[and] protection of individual rights," this has not been the case for Dr. Dias. The University organized an Investigation surrounded by bias, personal grievances, and retribution, purposefully intending to ruin Dr. Dias' reputation and career. Facts relevant to this case are set forth in the accompanying affidavit of Dr. Dias and affirmation of J. Morgan Levy, Esq.

LEGAL ARGUMENT

This case reflects the competitive nature of academia and illuminates the private squabbles that can threaten academic freedom. Because of their private interests, faculty may be induced to make biased decisions in their evaluation of academic work, unfairly favoring or disfavoring the work of another. *See* Stephen D. Sugarman, *Conflicts of Interest in the Roles of the University Professor*, Journal of Theoretical Inquiries In Law, at 259 (2005).

I. The University's concluding a biased investigation related to Dr. Dias's research without allowing the faculty Grievance Committee to adjudicate his grievance is arbitrary and capricious and irrational.

While private actors are not typically subject to Article 78 proceedings, courts have the power to examine a college's actions and determine whether they have abided by their own rules, and whether they have acted in good faith, or their action was arbitrary or irrational. *See Tedeschi v. Wagner Coll.*, 49 N.Y.2d 652, 658 (1980); *Matter of Trs. Of Union Coll.*, 195 A.D.3d

1216, 1217 (3d Dep't 2021); *Meisner v. Hamilton Bd. Of Coop. Educ. Servs.*, 175 A.D.3d 1653, 1656 (3d Dep't 2009). Courts typically defer to a university's institutional knowledge, but poor administrative decisions are not beyond judicial review. *See Gertler v. Goodgold*, 107 A.D.2d 481, 486 (1st Dep't 1985). Colleges and universities can create their own rules and procedures, but once such rules are in place, they must be followed. *See Bennett v. Wells Coll.*, 219 A.D.2d 352, 356 (4th Dep't 1986) ("Private colleges and universities, having accepted a State charter, 'can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes but also those imposed by their internal rules.'").

When a court reviews a university's determination, it is not substituting its own judgment for that of the university, but it is determining whether the college's action violated its own rules or were arbitrary and capricious. *Gertler*, 107 A.D.2d at 486. An action is arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts." *See Matter of Aponte v. Olatoye*, 30 N.Y.3d 693, 697 (2018). Courts will annul a university's determination where it lacks a rational basis, its analysis was superficial, or the decision was made without regard to the facts. *See Matter of John Doe 1 v. Syracuse Univ.*, 188 A.D.3d 1570, 1572 (4th Dep't 2020); *Aponte*, 30 N.Y.3d at 697. If a party fails to follow its own rules, it has acted arbitrarily and capriciously. *See St. Joseph's Hosp. Health Ctr. V. Dep't of Health*, 247 A.D.2d 136, 155 (4th Dep't 1998); *Church v. Wing*, 229 A.D.2d 1019, 1020 (4th Dep't 1996).

The Court's role in an Article 78 proceeding is to determine whether the college "substantially adhered to its own published rules and guidelines . . . so as to ascertain whether its actions were arbitrary and capricious." *Rensselaer Soc'y of Eng'rs v. Rensselaer Polytechnic Inst.*, A.D.2d 992, 993 (3d Dep't 1999); *see also Tedeschi*, 49 N.Y.2d at 660. A university's rules must be followed as they are the cornerstone of protecting against threats to academic freedom.

See Klinge v. Ithaca Coll., 244 A.D.2d 611, 613 (3d Dep't 1997). When it comes to the rights of professors, a university's rules are "a means to protect academic freedom. in order for the institution to achieve its purposes, a 'pall of orthodoxy' cannot be cast over the classroom. . . . Without some position security, professors could be discharged for hidden ideological reasons" *N.Y. Inst. Of Tech. v. State Div. Of Human Rights*, 40 N.Y.2d 316, 322-23 (1976).

A. The University acted arbitrarily and capriciously by allowing for biased actors to conduct the Investigation.

As more fully described in Dr. Dias's Verified Petition, the University is required to convene a neutral Investigation Committee, "unaffected by the inquiry". Exhibit 1 (Verified Petition). Instead of finding neutral actors, the University allowed individuals with significant biases, including those with professional and personal conflicts, to serve on the Investigation Committee. The University permitted the members of the Investigation Committee to continue, even after Dr. Dias pleaded with them to find new members. *See* Exhibit 1, paras. 31-48.

In August 2023, prior to the conclusion of the Investigation (and as more fully described in Affirm. of J. Morgan Levy, Exhibit A, Dr. Dias's prior Article 78 petition - the December Petition - and related exhibits), Dean Heinzelman made the unilateral decision to remove all of Dr. Dias's students from his laboratory, teaching, and mentoring. *See* Affirm. of J. Morgan Levy, Exhibit A, pg. JMLAffDias000012, paras. 59-61, and JMLAffDias000157. As these students would serve as witnesses in the Investigation, Dean Heinzelman's actions prejudiced witnesses by giving the impression of wrongdoing by Dr. Dias before the investigation was completed. The University also refused to interview witnesses Dr. Dias requested, and yet, interviewed and gave clearly biased witnesses the authority to determine what evidence was relevant and should be subject to the Investigation Committee's review. *See* Exhibit 1, paras. 120-129.

The University's legal counsel collaborated with University administrators and students to request a retraction of Dr. Dias's paper during the Investigation, despite its policy requiring retraction requests only occur at the conclusion of the investigation. *See* Exhibit 1, paras. 59-64. The University's legal counsel then sat alongside the Investigation Committee's interviews of parties. *See* Exhibit 1, paras. 76-79. Because the University's counsel clearly already determined Dr. Dias's guilt in this case, their participation in the clearly allowed for bias in the Investigation.

B. The University acted arbitrarily and capriciously by predetermining Dr. Dias's guilt prior to the Investigation concluding.

The University acted arbitrarily and capriciously throughout the Investigation process, barreling towards the assumption of guilt without any interest in finding an alternative narrative to that it had already determined occurred. As mentioned above, the University removed students under Dr. Dias' tutelage before the Investigation concluded. This not only demonstrated to witnesses that the University had already decided his guilt but is also a serious violation of Dr. Dias's academic freedom and an attempt to ignore his rights pursuant to the Faculty Handbook. *See* Aff. of Dr. Dias, Exhibit B, or Affirm. of J. Morgan Levy, Exhibit A.

The University also clearly predetermined guilt when its legal counsel and Mr. Steven Dewhurst, Vice President of Research, worked with students and others to prepare and send retraction letter to *Nature* before investigation concluded. The University also gave one of the individuals participating the University's request to *Nature* (Dr. Sachith Dissanayake) a new, and much more secure, faculty position before he signed off on the proposed request. *See* Exhibit 1, paras. 65-73.

The Investigation Committee refused to interview the graduate and undergraduate students in Dr. Dias's group who possessed a deep understanding of the techniques, specifically

Mr. Nugzari Khalvashi-Sutter and Mr. Sasanka Munasinghe, while they worked collaboratively Mr. Raymond McBride [a student who continuously struggled to understand the concepts related to these issues]. Mr. Khalvashi-Sutter and Mr. Munasinghe were two students not involved in the letter drafted by Vice President Dewhurst and Ms. Thornton in concert with various other students and sent to *Nature*. Mr. McBride, known to the University to have contention with Dr. Dias, on the other hand, aided the Investigation Committee in determining relevancy of document. The choice of students to interview highlights actual biases and conflicts of interest within the Investigation Committee's outcome-oriented proceedings.

The Investigation Committee also interviewed witnesses outwardly biased towards Dr. Dias, highlighting a willful ignorance of credibility. Two witnesses interviewed by the Committee had personal grievances with Dr. Dias. Dr. Ashkan Salamat was fired from the company he cofounded with Dr. Dias and Dr. Dylan Durkee, who left Dr. Dias's research team after his wife was fired from the same company Dr. Dias was affiliated with.

The University failed to abide by basic tenants of due process throughout the Investigation process. The Investigation Committee refused to provide Dr. Dias reasonable accommodations when requested, including when Dr. Dias requested a delay in meeting with the Investigation Committee due to his wife's giving birth. Instead of granting a rescheduled meeting, the Investigation Committee responded indicating it would no longer meet with Dr. Dias again, at all. In another example, the Investigation Committee took forty (40) weeks and one day, totaling 281 days, to prepare its draft investigative report; more than double the time identified in the Policy. The Policy articulates an investigation should be completed within 120 days after its initiation. *See* Affidavit of Dr. Dias, Exhibit B, pg. 59. And while the Investigation Committee took its time, over double the allotted time in the Policy, it refused to allow Dr. Dias

much time to respond to the 500+ page report, even when it provided the report to Dr. Dias on the evening of December 22, 2023. The report was also available for download, but none of the exhibits were, inhibiting Dr. Dias from effectively defending himself as he could only review hundreds of pages on his computer screen.

The Investigation Committee failed to consider English is not Dr. Dias' first language, as he comes from Sri Lanka and occasionally encounters challenges in fully grasping the nuances of the English language. Dr. Dias might have benefitted from an attorney to assist with the language of an investigation as he often requires additional time for information processing in a conducive environment. While Dr. Dias was not permitted to bring an attorney with him to the Investigation Committee interviews, the Investigation Committee was permitted to have (and did have) its own legal counsel present during Dr. Dias's testimony.

The Investigation Committee also offered a recommendation of sanctions for Dr. Dias, culminating in termination, which is not its intended purpose, per the Policy. *See* Aff. of Dr. Dias, Exhibit B, pg. 59. By the Investigation Committee determining guilt and outcome, and not the provost, as the Policy dictates, it is inherently acting as judge and jury, and not offering Dr. Dias a fair review or response to the report, as his fate has already been predetermined.

C. The University acted arbitrarily and capriciously by not granting the Grievance Committee the opportunity to address Dr. Dias's report of the University violating his academic freedom before concluding its Investigation.

The role of the University-wide Faculty Senate at the University of Rochester includes the responsibility "to inquire into any matter . . . that has implications for the academic function and welfare of the University and to make recommendations concerning such matters . . ." *See* Aff. of Dr. Dias, Exhibit B, pg. 8. Upon receipt of a grievance, the Senate's University Committee on Tenure and Privileges (herein after "UCTP") establishes a Faculty Grievance Committee (herein after "Grievance Committee") responsible for investigating the allegations,

conducting interviews, making recommendations and reporting its findings. The Grievance Committee's report is presented to the UCTP for comment before turning over the report to the provost for an ultimate determination. *See* Aff. of Dr. Dias Exhibit B, pgs. 41-45.

The University is aware Dr. Dias filed a grievance regarding Dean Heinzelman's removing students from his mentoring and teaching, alleging such removal was a violation of his academic freedom and evidence of bias against him. *See* Exhibit 1, paras. 52-55. Dean Heinzelman's alleged actions cannot be assessed separately from the Investigation; indeed, her alleged actions are evidence of the University's predetermination of Dr. Dias's responsibility well before the Investigation concluded.

While the University initially declined to refer the grievance to a Grievance Committee, it has now agreed to convene one, however it has not. *See* Aff. of Dr. Dias. Despite Dr. Dias's requests for updates regarding when the Grievance Committee will begin its work, he has no information indicating the Grievance Committee could be permitted to do its work before the Investigation is concluded. Indeed, Provost Figlio appears to be the holding up this process by failing to appoint an academic advisor to it. In contrast, the University fast-tracked the conclusion of the Investigation, issuing a determination letter on February 14, 2023, effectively prohibiting the Grievance Committee from reviewing Dr. Dias's complaint of bias in the Investigation process. This tactic represents an attempt to end run the carefully crafted shared governance rules in place at the University.

As articulated by the American Association of University Professors (of which the University is a member) "The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others." AAUP American Association of University

Professors Policy Documents and Reports, Eleventh Edition 2015[1], pg. 118. The AAUP continues to explain:

> *Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise, there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.*

Id. at 121. The AAUP further clarifies the "faculty should have primary authority over decisions about standards of faculty competence bear directly on the teaching and research conducted in the institution — that is, the administration should "concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail" (*Id.* at 128) and "the faculty's voice on matters having to do with teaching and research should be given the greatest weight." *Id* at 124.

[1] AAUP statements are widely respected and followed by American colleges and universities, and courts—including the Supreme Court of the United States—have recognized them as authoritative expressions of foundational principles adhered to by the academic profession. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971); *Gray v Bd. of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982) (observing that "AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies" and collecting supporting caselaw).

Finally, the AAUP assert experienced faculty committees— whether constituted to address curricular, personnel, or other matters— must be free to bring to bear on the issues at hand not merely their disciplinary competencies, but also their first- hand understanding of what constitutes good teaching and research generally, and of the climate in which those endeavors can best be conducted. *Id.*

Importantly the AAUP clarifies the reason faculty should be involved in decisions is to ensure the protection of academic freedom. *Id.*, ("allocation of authority to the faculty in the areas of its responsibility is a necessary condition for the protection of academic freedom within the institution"). The AAUP asserts the issue of academic freedom emerges most clearly in the case of authority over faculty status and clarifies to the extent that decisions on such matters are not in the hands of the faculty, there is a potential for, and at times the actuality of, administrative imposition of penalties on improper grounds. *Id.*, at pgs. 124 -5.

In this case, the University's faculty had been excluded from participation in determinations of standards of faculty competence and research conducted in the institution.

II. A temporary restraining order preventing the University from completing its investigation should be issued.

Petitioner seeks an order restraining respondent from concluding its investigation into alleged research misconduct pursuant to 22 NYCRR 202.8-d, NY CPLR § 6313(a). To establish an entitlement to a preliminary injunction, Dr. Dias must establish, by clear and convincing evidence, three separate elements: (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of equities tipping in the moving party's favor. *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 213 (4th Dept 2009).

A. Petitioner will likely succeed on the merits of his claim.

To demonstrate a likelihood of success on the merits, it is sufficient for the moving party to make a prima facie showing of his or her right to relief and the actual proving of the case should be left to the full hearing on the merits. *Cangemi v. Yeager*, 128 N.Y.S.3d 708, 711 (App. Div. 4th Dept. 2020).

For all the reasons articulated in Argument I, above, in Dr. Dias's Verified Petition and the associated affidavits, affirmations, and related exhibits, Dr. Dias is likely to succeed on the merits.

B. Claimant will suffer immediate and irreparable injury, loss, or damage unless the court restrains the opposing party while the preliminary injunction motion is pending.

Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient. *Bashian & Farber, LLP v. Syms*, 46 N.Y.S.3d 202, 205 (App. Div. 2d Dept. 2017). For purposes of a preliminary injunction, it must be shown that the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to defendant through imposition of the injunction. In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation. *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 213 (4th Dept 2009)

The Supreme Court has held that the loss of employment does not, in and of itself, constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90-91, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974). It made this finding in the context of an individual probationary employee's discharge. *Id.* Yet even in that context, it left open the possibility "that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Id.* at 92 n.68; see also *Holt v. Cont'l Group, Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983). Thus, while

preliminary injunctive relief is inappropriate in typical instances of employee discharge, the Supreme Court expressly "refused to foreclos[e] relief in the genuinely extraordinary situation." *Sampson*, 415 U.S. at 92 n.68.

While the requisite irreparable harm is not established in employee discharge cases by mere financial distress or inability to find other employment, it may be established in truly extraordinary circumstances. *Holt v Cont. Group*, 708 F2d 87, 90-91 (2d Cir 1983) citing *Sampson v. Murray*, at 61, 91-92 & n.68; *EEOC v. City of Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). In this case truly extraordinary circumstances exist.

The University has been clearly intent to terminate Dr. Dias's employment well before the Investigation concluded. This was clear when it removed his students, recruited Dr. Sachith Dissanayake away from him, and worked with its legal counsel to request his paper be retracted from *Nature*, before any investigation had concluded he was responsible for research misconduct. Additionally, the intent to terminate Dr. Dias' employment is clearly stated in the Investigation Committees' report, which has now been accepted by the University. *See* Aff. of Dr. Dias, Exhibit L, pg. 117 and Exhibit P.

Unlike many other employees, Dr. Dias works in a highly specialized field shared with less than 1,000 other scientists in the world. Should the University be permitted to procced on the basis of its biased investigation, not only will Dr. Dias's professional reputation be irrevocably damaged, the groundbreaking science he is pursuing will be stalled.

C. A balancing of the equities supports the issuance of the TRO.

The third and final prong of the test for evaluating the propriety of a preliminary injunction is a balancing of the equities. It must be shown that the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to defendant through

imposition of the injunction. *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.*, 889 N.Y.S.2d 793, 802 (App. Div. 4th Dept. 2009).

The University's allowing the Grievance Committee to investigate Dr. Dias's allegations of the University's infringing on his academic freedom prior to concluding the Investigation will cause no harm to the University. In contrast, the University's excluding faculty input into this matter by concluding the Investigation without the Grievance Committee's insight is contrary to the University's shared governance rules and practices and has significant implications, not just for Dr. Dias, but for all faculty at the University.

CONCLUSION

Because Dr. Dias has established (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of equities tipping in his favor, he respectfully requests this court issue a temporary restraining order prohibiting the University from concluding its investigation until the Grievance Committee adjudicates his grievance.

Dated: Rochester, New York
February 14, 2024

/s/ J. Morgan Levy

J. Morgan Levy Esq.
Attorney for Petitioner
24 N. Main Street, Ste 2
Fairport, NY 14450
E: Morgan@jmorganlevyfirm.com
P: 585-678-1160